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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 374

THE PEOPLE OF THE STATE OF NEW YORK,
PETITIONERS,

vs.

MARK M. MACLAY AND CHARLES E. McWILLIAMS,
RECEIVERS OF McWILLIAMS BROS., INC., AND
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,071)

(37,071)

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. E 40-20

North River Coal & Wharf Co., Complainant,

against

McWilliams Bros., Inc., Defendant

Notice of Appeal

Sirs: Please take notice that the People of the State of New York hereby appeal from the Order made herein on the 16th day of March, 1931, holding that the claims of the People of the State of New York for franchise taxes due from the defendant McWilliams Bros. Inc., in total $3,131.05, were subordinate to the claims of the United States of America and were not entitled to priority in payment to said claims of the United States of America and were not entitled to ratable payment with the claims of the United States of America, from the funds in the hands of the receivers in this action. This appeal is taken from each and every part of said order, insofar as the same relates to the determination of the question of the relative priorities [fol. 2] to be accorded between the claims of the People of the State of New York and the claims of the United States of America.

Dated April 4, 1931.

Yours, etc., John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Petitioner-Appellant, People of the State of New York, Capitol, Albany, New York.

To Kobbe, Thatcher, Frederick & Hoar, Esqs., Solicitors for Receivers for McWilliams Bros. Inc., 128 Broadway, Borough of Manhattan, City of New York; Hon. George Z. Medalie, United States Attorney, Post Office Building, Borough of Manhattan.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

Your petitioner, The People of the State of New York, conceiving itself aggrieved by the certain order entered on the 16th day of March, 1931, in the above entitled proceeding, which said order determined that the claims of the United States of America, totaling the principal sum of $34,180.43 with interest, and specifically stated in Subdivision C of paragraph number 1 of said order, were payable in priority to the claims of the State of New York allowed herein, in the aggregate amount of $3,131.05 with interest, and further providing that if the funds in the hands of the receiver remaining after the payment of the amounts specified in said order should not be sufficient to pay said claims of the United States in full, said remaining funds should be applied by the receivers to the ratable payment of the said claims of the United States of America, hereby petitions for [fol. 4] an appeal from the said order to the United States Circuit Court of Appeals for the Second Circuit and prays that its appeal may be allowed and that a citation may be granted directed to the receivers and trustees and other persons interested in this proceeding, demanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said cause, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Second Circuit and, in connection with this petition, the said petitioner, The People of the State of New York herewith presents its assignment of errors.

Dated New York, March 18, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Petitioner, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fol. 5] IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING BOND

The undersigned, solicitors for the receivers of the above named defendant, and the appellee, the United States Attorney for the Southern District of New York, hereby waive the giving of a bond for costs by the appellant, The People of the State of New York, in connection with the foregoing petition for appeal.

Kobbe, Thacher, Frederick & Hoar, Solicitors for Receiver. George C. Medalie, United States Attorney, Southern District of New York.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

And now, to wit, this 28th day of March, A. D., 1931, upon reading and considering the foregoing petition, it is, upon motion of John J. Bennett, Jr., Esq., Attorney General of the State of New York, Solicitor for Appellant,

Ordered by the Court that the foregoing appeal be and hereby is allowed, and the solicitors for the receivers herein waiving the giving of a bond for costs by appellant, no order as to bond is made.

William Bondy, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now come the People of the State of New York, petitioner-appellant, and file this, its Assignment of Errors, and in connection with its petition of appeal say that in the record of proceedings and in an order made and entered herein on the 16th day of March, 1931, manifest error hath intervened to the prejudice of the appellant, to wit:

First. That the Court erred in determining that the claims of the United States of America specified and set forth in subdivision C of Paragraph 1 of the Order ap-

pealed from, constituting three items, as follows: to wit, the amount of $516.46 with interest at 6% from August 14, 1926 to date of payment, the amount of $5,263.24 with interest from April 13, 1923 to the date of payment at the rate of 1% per month, the amount of $28,400.73 with interest from November 13, 1925 to the date of payment at the rate of 1% per month, were each and entirely payable by the receivers herein in priority to the claims of the People of the State of New York amounting to the aggregate sum [fol. 7] of $3,131.05 with interest at the rate of 6% upon the respective items thereof from the respective dates of accrual to the date of payment, whereas in law and fact, said claims of the People of the State of New York were payable in priority to the said claims of the United States of America, said priority of the People of the State of New York arising from the inheritance by the State of New York of the common law sovereign right of priority possessed by the Crown of England, a right which was not surrendered or ceded to the United States of America, under and pursuant to the constitution of the United States of America or any of the amendments thereof. And that the Congress of the United States of America had no constitutional right to pass any law or laws which would in any manner, shape, or form, prejudice or interfere with the assertion of the sovereign right of priority possessed by the State of New York, in the payment of taxes and other indebtedness due said State.

Second. That the Court erred in determining that the claims of the United States of America specified and set forth in paragraph "First" of this assignment of errors, were entitled to any priority over the claims filed by the People of the State of New York, in that the United States of America did not inherit or obtain the sovereign right of priority possessed by the Crown of England, but said right of priority was and is the exclusive right of the several states of the United States of America.

Third. The Court erred in determining that the claims of the United States of America specified and set forth in [fol. 8] paragraph "First" of these assignments of errors, were entitled to priority of the claims filed by the State of New York and on the ground that should it be determined that the United States of America had any priority

in the payment of its debts over general creditors and said United States of America had an equal priority with that possessed by the People of the State of New York, which the petitioner-appellant disputes, that then said priorities are in the same class of preferences and if the estate of the defendant is not enough to pay the several claims of the United States of America and the People of the State of New York in full, that the balance of the estate should be pro-rated between the United States of America and the People of the State of New York in the proportion that the balance of the estate in the hands of the receivers bears to the total amount of the respective claims of the United States of America and the People of the State of New York.

Wherefore your appellants pray that the order of the United States District Court for the Southern District of New York, granting to the United States of America the priority in the payment of its claims over the claims of the People of the State of New York as specified in said order be reversed, with costs. That it be determined that the claims of the State of New York for taxes aggregating $3,131.05 with interest is a preferred claim payable in priority to the claims of the United States of America, or, if it should be determined by the Court that the United States [fol. 9] of America has a priority equal to that possessed by the State of New York, that it be determined by the Court that the respective preferences of the United States of America and the People of the State of New York are equal in degree and, in the event of a deficiency of assets to pay the several claims in full, that the balance of the estate of the defendant be ordered pro-rated among the United States of America and the People of the State of New York, in accordance with the ratio that said balance of the estate bears to the total claims of the said United States of America, and the People of the State of New York, and that the cause be remitted to the United States District Court for the Southern District of New York for such further proceeding as may be in conformity with Justice and Equity.

Dated New York, March 18, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Appellant, The People of the State of New York. Office & Post Office address: Capitol, Albany, New York.

[fols. 10 & 11] Citation, in usual form, omitted in printing.

[fol. 12] In United States District Court

[Title omitted]

Notice of Motion for Order Determining Amounts and Validity of Claims, etc.

Sirs: Please take notice that upon the annexed affidavit of Mark W. Maclay, verified January 10, 1931, and on all of the proceedings heretofore had herein, a motion will be made at Room 235, Post Office Building, Borough of Manhattan, City of New York, on the 23rd day of January, 1931, at 10:30 A. M., for an order determining the amounts and validity of the claims described in the annexed affidavit and the rights, if any, of said claimants to priorities in distribution, and for an order disallowing each of said claims, [fol. 13] and for such other and further relief as the justice of the cause may require.

Dated New York, January 9, 1931.

Yours, etc., Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers of McWilliams Bros., Inc., 128 Broadway, New York City.

To the United States Attorney, Post Office Building, New York City; Hon. John J. Bennett, Jr., Attorney-General of the State of New York, 51 Chambers Street, New York City.

[fol. 14] In United States District Court

[Title omitted]

Affidavit of Mark W. Maclay—Verified January 10, 1931

State of New York,
County of New York, ss:

Mark W. Maclay, being duly sworn, says:

1. I am one of the receivers of McWilliams Bros., Inc., the defendant above named.

2. On or about January 20, 1927, the United States Government filed its claim herein for additional income taxes as follows:

Nature of tax	Year of taxable period ended	Amount of tax	Together with interest at 1% per mo. until paid. Interest began
Add'l Income Tax	1/1/17-7/13/17 Wash. Feb.424B-1923 List	$5,263.24	April 13, 1923
Add'l Income Tax	1918 Sept.590101-1926 List Trans. from 3rd N. Y.	28,400.73	Nov. 13, 1925
		$33,663.97	

3. On or about March 19, 1927, the United States Government filed its claim herein in the sum of $516.46 for [fol. 15] alleged expenses incurred by the Light House Service on July 13, 1926, in connection with replacing Dredged Channel Buoy No. 4, Bridgeport Harbor, Connecticut, which it was alleged was run into by the tug Chal McWilliams, with tow, belonging to McWilliams Bros., Inc., and lost.

4. On each of the foregoing claims the United States of America claimed to be entitled to preference and priority of payment under Section 3466 of the Revised Statutes and demanded that said claims be paid prior to other debts or liabilities of McWilliams Bros., Inc.

5. On or about September 16, 1927, the State of New York, through its Department of Taxation and Finance, made claim for said taxes under Sections 182 and 184 of the Tax Law as follows:

File No. 424606—1921 (Section 184) tax	$39.93
File No. 439031—1922 (Section 184) tax	653.27
File No. 456850—1923 (Section 184) tax	914.77
File No. 479436—1924 (Section 184) tax	208.85
File No. 504123—1925 (Section 182) tax	215.62
File No. 507497—1925 (Section 184) tax	285.38
	$2,317.82

On January 12, 1928, the State of New York gave notice to said receivers of an unliquidated claim for franchise taxes against the defendant for the years 1925, 1926 and 1927, and subsequent years, pursuant to the provisions of Section 182 of Article Nine of the Tax Law, until the termination of these proceedings; also taxes upon the gross

earnings pursuant to the provisions of Section 184 of Article Nine of the Tax Law for the years ending June 30, 1926 and June 30, 1927, and for all subsequent years or [fol. 16] parts thereof to the date of termination of these proceedings, the exact amount of such taxes and interest being alleged to be unknown at the date of said notice.

Subsequently, and under date of January 5, 1929, the State of New York mailed to said receivers the following liquidated claim for taxes, in addition to taxes for which claims were submitted under date of September 16, 1927:

Tax law	For tax year beginning	Interest at 6% per annum to date of payment from	Amount
	Franchise Taxes		
Sec. 182.			
Article 9	Jan. 1, 1926.....	March 15, 1926.....	$208.22
" "	Jan. 1, 1927.....	March 15, 1927.....	173.11
" "	Jan. 1, 1928.....	March 15, 1928.....	99.37
" "	Jan. 1, 1929.....	March 15, 1929.....	10.00
	Gross Earnings Taxes for Each Year Ending June 30		
Sec. 184.			
Article 9	1926	August 15, 1926.....	193.64
" "	1927	August 15, 1927.....	103.96
" "	1928	August 15, 1928.....	24.93
			$813.23

The receivers understand that this claim is a liquidated statement of the unliquidated claim filed on January 12, 1928.

Priorities and liens are claimed for the foregoing State taxes alleged to be due as franchise taxes and taxes on gross earnings.

6. It is the opinion of the receivers and their counsel that the said claims are invalid in whole or in part and that the same should be disallowed in whole or in part.

[fol. 17] 7. In an order in this action made by Honorable Thomas D. Thacher, District Judge, dated May 24, 1929, and entered in the office of the Clerk of this Court on May 24, 1929, it was provided as follows:

"(6) Before any further distribution is made by the Receivers from the moneys or the proceeds of the United States Treasury notes on deposit in their general account, the claims of the United States Government and of the State of New York set forth in article Sixth of the petition, and

more particularly described in the affidavit of Karl T. Frederick verified January 15, 1929, shall be brought on for hearing before this Court, or before a special master, to be appointed by this Court, on application to be made by the Receivers, to determine the amounts and validity of said claims, or either of them, and the rights, if any, of said claimants to priorities in distribution of the remaining moneys in the Receivers' general account."

8. That the claims described herein in paragraphs 2, 3, 4 and 5 are the same claims described in the affidavit of Karl T. Frederick, verified January 15, 1929, referred to in the said order.

9. No previous application for the relief herein sought has been made.

Wherefore the receivers herein request that the amounts and validity of the said claims and the rights, if any, of said claiman's to priorities in distribution of assets be deter-
[fol. 18] mined, that the said claims, and each of them, be disallowed, and for such other and further relief as may be just in the premises.

Mark W. Maclay.

Sworn to before me January 10, 1931. Commission expires March 30, 1931. Elsie M. Martin, Notary Public, Bronx Co., No. 113. Certificate filed in N. Y. & Kings Counties. N. Y. Co. No. 445, Kings Co. No. 44. N. Y. Reg. No. 1M321, Kings Reg. No. 1222, Bronx Reg. No. 3161.

[fol. 19] In United States District Court

[Titled omitted]

Stipulation as to Facts

The receivers of McWilliams Bros., Inc., the above named defendant, heretofore and on January 12, 1931, served upon the United States Attorney for the Southern District of New York a notice of motion with attached affidavit seeking an order determining the amount and validity of certain

claims heretofore filed in this proceeding by the United States and described in the said affidavit dated January 10, 1931, attached to said notice of motion. The attorneys for the receiver and for the United States hereby stipulate and agree that the facts hereinafter set forth relating to the said claims of the United States are true:

1. By order of this Court, dated January 10, 1927, Mark W. Maclay and Charles E. McWilliams were duly appointed temporary receivers of the defendant above named in an action duly instituted in this court for the conservation of the assets of the said defendant on behalf of its creditors. Such receivers duly qualified and have ever since been and still are such receivers.

[fol. 20] 2. By a further order and decree of this court, dated on or about January 29, 1927, said receivership was made permanent. By said orders and decrees creditors of the above defendant were required to file their claims herein.

3. On or about March 24, 1927, the United States filed a claim herein in the amount of $516.46 claiming that the defendant is indebted to the United States in said amount for expenses incurred by the Lighthouse Service in connection with replacing dredged Channel Buoy No. 4, Bridgeport Harbor, Connecticut, which was run into by the Tug Chal McWilliams with tow belonging to the defendant and lost. The receivers have examined said claim and believe it to be a just and proper claim against the said defendant in the amount stated. The United States asserts the right to priority in payment thereof pursuant to the provisions of Section 3466 of the Revised Statutes and also asserts that it is entitled to interest thereon at the rate of 6% from August 14, 1926, the date when formal bill was rendered to the defendant by the Lighthouse Service to the date of payment, whenever such payment shall be made by the receivers. The receivers are in doubt as to the right of the United States to such priority of payment as well as to its right to receive interest subsequent to January 10, 1927, the date of the appointment of the receivers herein.

4. On or about January 25, 1927, the United States filed a claim herein for additional income tax under the Revenue Act of 1916 for the period January 1, 1917 to July 13, 1917, in the amount of $5,263.24.

[fol. 21] McWilliams Bros., Inc., the above defendant, was organized under the laws of the State of New York and commenced business on or about July 14, 1917. It succeeded a partnership known as McWilliams Brothers and took over all of the assets and liabilities of such partnership. The above assessment was made for additional income taxes claimed to be due on the part of said partnership.

The assessment of the said tax was made March 8, 1923.

The assessment includes a penalty, the amount of the tax without penalty being $4,409.80.

The United States claims interest at 1% per month from April 13, 1923, to date of payment of said claim by the receivers and also claims priority in payment under Section 3466 of the Revised Statutes and by virtue of the sovereignty of the United States.

The original return of McWilliams Brothers (the partnership) was filed on October 14, 1922.

McWilliams Brothers (the partnership) never signed any waiver or extension of time within which to assess or collect said assessment.

No proceedings by way of suit, restraint or otherwise were ever commenced or prosecuted by the United States for the collection of said tax other than by way of the filing of said claim herein on January 25, 1927.

5. On or about January 25, 1927, the United States filed a claim herein for additional income tax under the Revenue Act of 1918 for the calendar year 1918 in the amount of $28,400.73.

Said assessment was made for additional income taxes claimed to be due on the part of the above defendant.

[fol. 22] The return for the year 1918 was filed by the above defendant on June 16, 1919.

The assessment of said tax was made on or about September 15, 1925.

The United States claims interest at 1% per month from November 13, 1925, to date of payment of said claim by the receivers and also claims priority in payment under Section 3466 of the Revised Statutes and by virtue of the sovereignty of the United States.

No proceedings by way of suit, restraint or otherwise were ever commenced or prosecuted by the United States

for the collection of said tax other than by way of the filing of said claim herein on January 25, 1927.

On or about February 14, 1924, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

On or about June 2, 1924, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

On or about April 20, 1925, the defendant signed a waiver which was later signed by the Commissioner, a photostatic copy of which is attached hereto.

No other waivers relating to said tax are on file or exist so far as the parties are aware.

6. The State of New York stipulates that the claims of the United States are valid in the amounts stated therein.

7. The United States stipulates that the claim of the State of New York is valid in the amounts stated therein.

[fol. 23] 8. The only question as between the United States and the State of New York is with respect to their relative rights to priority in payment.

Dated New York, February 10, 1931.

Kobbe, Thatcher, Frederick & Hoar, Attorneys for Receivers. Robert E. Manley, Acting United States Attorney. John J. Bennett, Jr., Attorney-General, State of New York.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING PRIORITY OF CLAIMS, ETC.—May 24, 1929

A motion having duly come on for hearing before me on January 10, 1929, and for further hearing before me on [fol. 24] May 16, 1929, for an order settling the priorities of certain creditors, fixing allowances, directing a distribution of moneys in the special account of the Receivers of the above named defendant, instructing said Receivers respecting the claims of preferred and general creditors, and approving said Receivers' ad interim accounting, as

more particularly set forth at length in the notice of said motion and the petition and report annexed thereto of Mark W. Maclay and Charles E. McWilliams, as said Receivers, verified December 7, 1929,

Now, on due notice of said motion and said petition and report annexed thereto, with proof of due service thereof upon the claimants or the solicitors for claimants named in said petition as asserting liens and priorities on and to the proceeds of said moneys held by said Receivers in their special account; on said petition and report; on the affidavits of Karl T. Frederick, verified January 7, 1929, and January 15, 1929, the affidavit of Mark W. Maclay, verified January 11, 1929, the affidavits of W. W. Miller and A. C. Downing, each verified January 9, 1929, the affidavit of Albert H. Ely, Jr., verified May 20, 1929, and the affidavit of Mark W. Maclay, verified May 16, 1929; and on all proceedings heretofore had herein; and after hearing counsel for the respective parties appearing in support of, in opposition to, or for modification of the order prayed for in said motion; and after due deliberation thereon, it is

[fol. 25] Ordered, adjudged and decreed that

(1) The moneys and proceeds of the United States Treasury notes in the special account of the Receivers, with interest earned thereon, are subject, in order of priority, to:

(a) The claims of Tracy Towing Line, Inc., and Roe Towing & Transportation Co., Inc., as set forth in article sixth of the petition, against the proceeds in special account, said claims being as follows for the amounts set opposite the names of each of the following barges:

Claim of Tracy Towing Line, Inc.:

Adelaide	$15
Egbert	93.25
Grace	5.65
Madeleine	8.76
Red Devil	35
Red Indian	68.15
Red Rose	15
Shirley	15
Victoria	15
Total	270.81

Claim of Roe Towing & Transportation Co., Inc.:

Adelaide	$168.20
Defender	78
Joseph	105
Mildred	87.20
Stuart	162.60
Red Rose	181.20
Victoria	127.30
Total	909.50

[fol. 26] (b) Allowances to the Receivers and to their counsel, Kobbe, Thatcher, Frederick & Hoar, for their respective services and disbursements in collecting and disbursing the moneys in special account, the same to be apportioned against proceeds of boats pro rata;

(c) The claim of The New York Trust Company, as Trustee, under a mortgage and supplemental mortgage to secure an issue of 5% First Mortgage Bonds, dated, respectively, July 12, 1917 and June 10, 1919 (hereinafter referred to as Mortgage No. 1), as against the proceeds realized by the Receivers on the sales of boats subject to Mortgage No. 1; and

(d) The claim of Charles E. McWilliams and Adolph Dexheimer, as Trustees for Kate McWilliams under a mortgage dated March 11, 1921 (hereinafter referred to as Mortgage No. 2) as against the proceeds realized by the Receivers on the sales of boats subject to Mortgage No. 2.

(2) The claims of the United States of America and of the State of New York set forth in article sixth of the petition and more particularly described in the affidavit of Karl T. Frederick, verified January 15, 1929, are not entitled to preferance or priority with respect to the moneys or United States Treasury notes in the Receivers' special account as against the claims and allowances hereinabove set forth in paragraph (1) of this order and listed thereunder as "a", "b", "c" and "d".

(3) The moneys and proceeds of United States Treasury [fol. 27] notes in the special account of the Receivers be distributed and paid over by the Receivers in the following order and manner:

(a) All interest paid by the depositary and/or earned on said Treasury notes be apportioned and added to the proceeds of the several vessels;

(b) Payment be made to Messrs. Macklin, Brown, Lenahan & Speer, as proctors for Tracy Towing Line, Inc., and for Roe Towing & Transportation Co., Inc., from the proceeds of the respective vessels, and in the principal amounts set forth in paragraph (1)-(a) of this order, with proportionate interest earned thereon by the Receivers;

(c) An allowance be paid to Charles E. McWilliams, as Receiver, in the sum of $5,000 00/100, Mark W. Maclay, as Receiver, in the sum of $5,000 00/100 and disbursements amounting to $47 69/100, or in all the sum of $5,047 69/100, and Kobbe, Thatcher, Frederick & Hoar, as solicitors for the Receivers, in the sum of $10,000 00/100 and disbursements amounting to $721 45/100 or in all the sum of $10,721 45/100 for their respective services rendered and disbursements paid at the request and with the consent of the mortgagees, and for their benefit and the benefit of all other preferred and general creditors in connection with the admiralty proceedings against all vessels mentioned in the mortgages and the recovery by them from the proceeds of the sales of said vessels in admiralty of the moneys and Treasury notes now on deposit in the Receivers' special account, said payments to each of the Receivers and to their counsel to be apportioned against proceeds of boats pro rata.

[fol. 28] (d) Three sixty-thirds (3/63) of the net remainder of the proceeds, with interest earned thereon, of vessels covered by Mortgage No. 1 as set forth in article fifth of the petition, not exceeding the sum of Three Thousand Dollars ($3,000) and accrued interest, be paid into the Registry of this Court, there to be held, subject to the claim, if any, of The New York Trust Company, as Trustee, and the claims of the holders, if they can be ascertained, of bonds numbered 74, 76 and 89 secured by Mortgage No. 1, or to the further order or orders of this Court.

(e) Sixty sixty-thirds (60/63) of the net remainder of the proceeds of sale of vessels covered by Mortgage No. 1, with interest earned thereon, as set forth in article fifth of the petition (not exceeding the sum of Sixty Thousand Dol-

lars ($60,000) and accrued interest on the sixty (60) bonds hereinafter mentioned), be paid to The New York Trust Company, as Trustee under said mortgage, for the benefit of the holders of the sixty (60) remaining bonds said to be outstanding and distribution to each of said holders of the proportionate share he shall be entitled to receive under and pursuant to the provisions of said mortgage, on presentation of his bond for the endorsement thereon of a suitable legend satisfactory to and approved by the solicitors for the Receivers evidencing such payment; and in case any of said remaining sixty (60) bonds shall have been lost, mutilated or destroyed, or for any reason whatsoever cannot be produced within ninety (90) days from the date hereof, then and in that event the balance of the money re-
[fol. 29] maining in the possession of the Trustee undistributed shall be paid over by it to the Registry of this Court, subject to the further order or orders of this Court; and

(f) The net remainder of the proceeds, with interest earned thereon, of vessels covered by Mortgage No. 2 as set forth in article fifth of the petition, not exceeding the sum of Forty-five Thousand Dollars ($45,000) and accrued interest, be paid to Charles E. McWilliams and Adolph Dexheimer, as Trustees for Kate McWilliams under Mortgage No. 2.

(g) Any further sums which may remain after the payments above directed shall remain in such special account subject to the further order of this Court.

(4) Payment be made by the Receivers from the proceeds of the barge Red Giant now on deposit in their general account to Messrs. Macklin, Brown, Lenahan & Speer, as proctors for Tracy Towing Line, Inc., in the sum of $97.50, with interest earned thereon by the Receivers, as set forth in article sixth of the petition.

(5) Ad Interim allowances be paid by the Receivers from the moneys in their general account to Mark W. Maclay, as Receiver, in the sum of $1,500.00/100 and disbursements amounting to $73.41/100, or in all the sum of $1,573.41/100; to Charles E. McWilliams, as Receiver, in the sum of $1,500; and Kobbe, Thatcher, Frederick & Hoar, as solicitors for said Receivers, in the sum of $2,500 and

disbursements amounting to $(411).26/100, or in all the sum of $2,911.26/100, on account of their respective serv-
[fol. 30] ices rendered and disbursements paid since January 10, 1927 in all matters pertaining to the general administration of this estate, exclusive of their several services performed in collecting the moneys now in and about to be disbursed from the Receivers' special account.

(6) Before any further distribution is made by the Receivers from the moneys or the proceeds of the United States Treasury notes on deposit in their general account, the claims of the United States Government and of the State of New York set forth in article sixth of this petition, and more particularly described in the affidavit of Karl T. Frederick verified January 15, 1929, shall be brought on for hearing before this Court, or before a special master, to be appointed by this Court, on application to be made by the Receivers, to determine the amounts and validity of said claims, or either of them, and the rights, if any, of said claimants to priorities in distribution of the remaining moneys in the Receivers' general account.

(7) The 19 claims of former deckhands or barge masters, members of the crews of the tugboats, and former office employees of the defendant, amounting to $2,226.16 for wages (as set forth in Schedule "C" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims.

(8) The 71 claims of merchandise and other general creditors, amounting to $24,605.76 (as set forth in Schedule
[fol. 31] "D" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims.

(9) The 19 claims of maritime lienors, amounting to $23,061.88 (as set forth in Schedule "E" annexed to the petition) are just and meritorious claims and are allowed as general creditors' claims for any remainders proved by said claimants to be outstanding after the termination of such proceedings in admiralty as may now be pending, or have been determined by final decrees, in the United States District Courts for the Southern and Eastern Districts of New York.

(10) The 27 claims of maritime lienors, amounting with interest and costs to $20,583.26 (as set forth in Schedule

"F" annexed to the petition), having been fully paid, are disallowed and the Receivers are instructed to mark said claims paid and to cancel them of record.

(11) The 16 wage claims, amounting to $776.48 (as set forth in Schedule "G" annexed to the petition) having been paid pursuant to an order of this Court dated February 25, 1928, be marked paid by the Receivers and cancelled of record.

(12) The claims of all mortgagees set forth in article fourth of the petition for any balances not heretofore recovered in admiralty proceedings or not paid from the distribution of the moneys in special account as hereinabove provided are just and meritorious claims and are allowed as general creditors' claims for such balances as may be established by said mortgagees.

[fol. 32] (13) The 18 claims of general creditors, amounting to $85,117.84 (as set forth in Schedule "H" annexed to the petition) be referred to a master hereafter to be appointed by this Court on application to be made by the Receivers if any assets remain in the estate after the payment of administration expenses and payments to preferential creditors ordered and approved by this Court.

(14) The itemized statements of account (as set forth in Schedule "I" annexed to the petition) showing all receipts and disbursements made by the Receivers since their appointment are hereby ratified, confirmed and approved.

T. D. Thacher, U. S. D. J.

IN UNITED STATES DISTRICT COURT

In Equity. E-40-20

OPINION OF HON. ALFRED C. COXE, DISTRICT JUDGE

COXE, J.:

It is my understanding that all outstanding differences except the question of priority as between the State and the Federal Governments have been adjusted and that the figures are correctly stated in the stipulation submitted on the motion.

On the question of priority, I hold that the Federal Government has priority over the State. (County of Spokane, Washington, et al. vs. United States, 279 U. S. 80; Stover, et al. vs. Scotch Hills Coal Co., 4 Fed. (2nd) 748.)

An order may be submitted on notice disposing of the motion in line with the above.

March 25th, 1931.

[fol. 33] IN UNITED STATES DISTRICT COURT

In Equity. E-40-20

NORTH RIVER COAL & WHARF CO., Complainant,

against

McWILLIAMS BROS., INC., Defendant

ORDER APPEALED FROM—March 16, 1931

A motion having duly come on for hearing before me on February 10, 1931, for an order determining the amounts and validity of the claims of the United States and the State of New York herein and their respective priorities in distribution, together with the priority of certain employees of the defendant,

Now, upon the notice of motion made by the receivers herein, dated January 9, 1931, and the affidavit of Mark W. Maclay, verified January 10, 1931, attached thereto, with proof of due service thereof, and upon the petition and report of the receivers herein, dated December 7, 1928, heretofore filed herein, and upon the order of Honorable Thomas D. Thacher herein, dated May 24, 1929, and upon the stipulation of facts, dated February 10, 1931, filed herein, and upon all of the proceedings heretofore had and papers here-[fol. 34] tofore filed herein, and after hearing counsel for the respective parties appearing in support of, in opposition to or in modification of the order prayed for in said motion, and after due deliberation thereon,

Now, on motion of Kobbe, Thatcher, Frederick & Hoar, solicitors for the receivers of McWilliams Bros., Inc., the defendant herein, it is

Ordered, adjudged, and decreed

1. That the moneys in the general account of the receivers with interest earned thereon are subject in order of priority

(a) First, to allowances to the receivers and to their counsel for their respective services and disbursements herein as the same shall be hereafter determined by this Court.

(b) Second, to the nineteen claims of former deckhands, barge masters, members of crews and employees of the defendant amounting to $2,226.16, without interest, for wages earned immediately prior to the receivership and as set forth in Schedule C attached to the petition and report of the receivers herein, dated December 7, 1928.

(c) Third, to the claims of the United States as follows:

(1) In the amount of $516.46 with interest at 6% from August 14, 1926, to date of payment;

(2) In the amount of $5,263.24 with interest from April 13, 1923, to the date of payment at the rate of 1% per month;

[fol. 35] (3) In the amount of $28,400.73 with interest from November 13, 1925, to the date of payment at the rate of 1% per month.

In the event that the funds in the hands of the receivers remaining after the payment of the amounts described in subdivisions (a) and (b) of this paragraph shall not be sufficient to pay said claims of the United States in full, said remaining funds shall be applied by the receivers to the ratable payment of the said claims of the United States.

(d) Fourth, to the claims of the State of New York in the aggregate amount of $3,131.05, with interest at the rate of 6% per annum upon the respective items thereof from the respective dates of accrual to the date of payment.

2. That the receivers herein are hereby authorized in their discretion to pay the respective amounts of the claims referred to in paragraph 1(b) hereof without awaiting the final determination of the allowances and expenses referred to in paragraph 1(a) hereof.

Alfred C. Coxe, U. S. D. J.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CONTENTS OF RECORD

It is hereby stipulated and agreed by and between the solicitor for the appellants and the solicitors for the appellees above-named that pursuant to the Rules of the United States Circuit Court of Appeals for the Second Circuit the transcript of the record for the purpose of the appeal of the State of New York from the order made herein on the 16th day of March, 1931, shall contain the following:

Notice of Appeal.
Petition for Appeal.
[fol. 37] Stipulation Waiving Bond.
Allowance of Appeal.
Assignments of Error.
Citation on Appeal.
Notice of Motion to Settle Priorities.
Affidavit of Mark W. Maclay, verified Jan. 10, 1931.
Stipulation as to Facts.
Order of Hon. Thomas D. Thacher, dated May 24, 1929.
Opinion.
Order Appealed from, dated March 16, 1931.
Stipulation as to Contents of Record.
Stipulation as to Correctness of Record.
Clerk's Certificate.
Dated April 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimants-Appellants.
Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers for McWilliams Bros., Inc., Appellees.
George B. Medalie, United States Attorney, Solicitor for Appellee, United States of America.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO CORRECTNESS OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District

Court for the Southern District of New York in the above entitled matter, as agreed upon by the parties.

Dated New York, April 15, 1931.

John J. Bennett, Jr., Attorney-General of the State of New York, Solicitor for Claimants-Appellants. Kobbe, Thatcher, Frederick & Hoar, Solicitors for Receivers for McWilliams Bros., Inc., Appellees. George B. Medalie, United States Attorney, Solicitor for Appellee, United States of America.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 44

Argued May 12, 1932. Decided June 13, 1932

North River Coal & Wharf Company, Complainant,

v.

McWilliams Bros., Inc., Defendant

Ex Parte

The People of the State of New York, Appellant,

v.

Mark W. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros., Inc., and United States of America, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Augustus N. Hand, Circuit Judges

From an order entered in the above equity receivership granting priority to the United States in the payment of

income taxes and of a claim by it for damages over the claim of the state of New York for franchise and gross earnings taxes, the latter appeals. Affirmed.

John J. Bennett, Jr., Atty. Gen. (Charles A. Schneider and Robert P. Beyer, Deputy Asst. Attys. Gen., of counsel), for the People of State of New York.

George Z. Medalie, U. S. Atty., of New York City (George Z. Medalie, Samuel C. Coleman, and Harry G. Herman, all of New York City, of counsel), for appellee.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

The question raised by this appeal is whether under section 3466 of the U. S. Revised Statutes (31 U. S. C. A. § 191) claims of the United States for unpaid income taxes and for damages are entitled to priority over claims of the state of New York for franchise taxes and taxes for gross earnings. The United States and the state of New York each presented its claims to receivers who had been appointed upon the filing of a creditors' bill alleging that the assets of McWilliams Bros., Inc., exceeded its liabilities and praying for the appointment of a receiver, and upon an answer admitting the allegations of the bill and joining in the prayer for relief. The District Court awarded priority to the United States.

The "consent receivership" in this case was in effect a "voluntary assignment." Under the decisions, the order appointing the receivers gave the United States priority over general creditors of the insolvent estate by virtue of section 3466 of the Revised Statutes. Price v. United States, 269 U. S. 492, 46 S. Ct. 180, 70 L. Ed. 373; United States v. Butterworth-Judson Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380. This priority attached when the receivers were appointed. United States v. Oklahoma, 261 U. S. at page 260, 43 S. Ct. 295, 67 L. Ed. 638. The question is whether section 3466 gives priority not only over the claims of general creditors, but over the claims of the state of New York for taxes, even though the taxes were liens upon the property of the insolvent at the time when the re- [fol. 41] ceivers were appointed. This section is in terms very sweeping. It provides that: Whenever any person in-

debted to the United States is insolvent * * * the debts due to the United States shall be first satisfied. * * *" The word "debts" has long been held to include taxes.

The state of New York relies upon the decision of the Supreme Court in Marshall v. New York, 254 U. S. 380, 41 S. Ct. 143, 65 L. Ed. 315, which gave the state, by virtue of its sovereign prerogative, a priority over the general creditors of an insolvent that had been placed in the hands of a receiver. It says that, as this prerogative right was never ceded to the federal government by the Constitution, it avails as much against the United States as against private creditors. But the right of the United States depends upon its delegated power under the Constitution (Const. art. 1, § 8, cl. 18) to pass all laws necessary for carrying into execution the express power to levy and collect taxes and duties. Price v. United States, 269 U. S. 492, 46 S. Ct. 180, 70 L. Ed. 373. It is consequently paramount whenever exercised by statute.

The question of the extent of the state's prerogative recently came before the Supreme Court in Spokane County, Wash., v. United States, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621. There taxes had been assessed against the personal property of a corporation by two counties in the state of Washington and afterwards a receiver of its assets was appointed who sold the property and reduced it to cash. The Supreme Court of Washington (Exchange Nat. Bank of Spokane v. U. S., 147 Wash. 176, 265 P. 722, 62 A. L. R. 139), from which the appeal lay, had held that under the law of that state the liens of the counties for the taxes assessed before the receiver was appointed had not been made specific. After the appointment of the receivers, the Commissioner of Internal Revenue assessed income taxes against the corporation for years prior to the date of the receivership. The funds in the hands of the receiver were, as in the present case, insufficient to pay in full claims of the United States and those of the counties. The court, per Taft, C. J., held that the taxes due the United States were entitled to payment by the receiver in priority to claims for county taxes that were not supported by a specific lien acquired prior to the appointment of the receiver. But he expressly reserved the question as to whether the taxes due the United States would have had priority if liens therefor had been perfected under the laws of the state prior to the

receivership, and cited the decision of the Supreme Court of Washington in Wilberg v. Yakima County, 132 Wash. 219, 231 P. 931, 933, 41 A. L. R. 184, where it was held that, if a tax is to be collected from personal property, "it does not become a lien upon such property until it has been seized and distrained by the sheriff. * * *" He emphasized the broad scope of the taxing power of the United States, referred to the decisions of the Supreme Court in United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304, Field v. United States, 9 Pet. 182, 9 L. Ed. 94, Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101, United States v. Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. Ed. 705, and other cases, and, after discussing the authorities, went on to say (at page 93 of 279 U. S., 49 S. Ct. 321, 324):

"The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the states."

Since the decision in Spokane County, Wash., v. United States there can be no doubt that the United States would be awarded priority here, unless the taxes due the state of New York can be regarded as supported by a sufficient lien to give them a preference over claims of the United States in spite of Rev. St. § 3466 (31 U. S. C. A. § 191).

Counsel for the state of New York attempt to distinguish Spokane County, Wash., v. United States on the ground that section 197 of the New York Tax Law (Consol. Laws, c. 60) provides that a franchise or gross earnings tax "shall be a lien upon and bind all the real and personal property of the corporation * * * until the same is paid in full," whereas the statute of the state of Washington before the court in the Spokane Case was construed as imposing no effective lien prior to the taking of subsequent proceedings to enforce it. But section 197, as it read when the New York taxes in the case at bar became payable, did not specify when the tax lien would arise, and section 201 provided that, upon the issue of a warrant by the tax commission commanding the sheriff to levy and sell the real and personal property of the taxpayer for delinquent taxes, "such warrant shall be a lien upon and shall bind the real and personal property of the * * * corporation against

[fol. 42] which it is issued, from the time an actual levy shall be made by virtue thereof." It might have seemed to result from these two sections (when read together) that the lien for state taxes only arises when a levy is made by the sheriff. But in New York Terminal Co. v. Gaus, 205 N. Y. 588, 98 N. E. 1109, a majority of the New York Court of Appeals held that section 197 imposed a lien for taxes which was superior to a mortgage. It is true that when New York Terminal Co. v. Gaus was decided section 197 provided that the taxes should "be a lien upon and bind all the real and personal property" of the corporation "from the time when it is payable until the same is paid in full," and that by amendment subsequent to that decision section 197 was changed so that the words "from the time it is payable" were omitted. Thus, when the franchise and gross earnings tax now before us accrued, section 197 had ceased to contain the words "from the time it is payable," and only provided that such a tax should be a lien "until the same is paid in full." Accordingly it might have been argued that by the amendment, words in section 197 stating when the lien was to arise had purposely been omitted so as to leave section 201 to define the time. But the difficulty with this is that a similar contention was made in Carey v. Keith, Inc., 250 N. Y. at page 219, 164 N. E. 912, and the Court of Appeals there held that such an omission did not affect the time when the lien arose.

While it is clear that in the present case the taxes due the state of New York prior to the receivership were a general lien upon the real and personal property of the defendant at the time when the receivers were appointed, the question is not whether these taxes are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government.

The Supreme Court appears to have given priority to the government under section 3466 or similar statutes in all cases except where the legal title of the taxpayer has been in some measure divested before the tax or other indebtedness became due. In Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271, debts due the United States were given precedence over the lien of a judgment-creditor who had not levied an execution against the property of the debtor.

Justice Washington said, at page 426 of 2 Wheat., 4 L. Ed. 271:

"If * * * before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa., the property is divested out of the debtor, and cannot be made liable to the United States. A judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799."

At common law a real estate mortgage gave the mortgagee title subject only to an equity of redemption, and a chattel mortgage divested the mortgagor's title in the same way. The Supreme Court accordingly treated the title as no longer in the estate of the mortgagor, and gave government taxes priority only over interests in the equity of redemption. Conard v. Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189; Brent v. Bank of Washington, 10 Pet. 596, 9 L. Ed. 547. It was apparently this view of the divesting of the legal title that led the Supreme Court to subordinate government taxes to mortgages in days when the legal title was generally regarded as in the mortgagee. It was reiterated by Justice Gray in Savings Society v. Multnomah County, 169 U. S. at page 428, 18 S. Ct. 392, 395, 42 L. Ed. 803, where he said:

"This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of congress in the distribution of the debtor's estate. * * *"

In view of the sweeping provisions of Rev. St. § 3466 (31 U. S. C. A. § 191, it seems unlikely that it was intended to allow the mere statutory declaration by a state of a general lien to give the latter a preference over debts and taxes due the government. Neither the decisions of the Supreme Court nor the specified priorities allowed third parties under Rev. St. § 3186 as amended (26 U. S. C. A. § 115)

indicate that section 3466 is subject to any such limitation. We hold that the court below properly awarded priority to the United States.

The state contends that a portion of the franchise and gross earnings taxes, amounting to $238.26, which accrued after the appointment of the receivers, should be given [fol. 43] priority as an expense of administration of the insolvent estate. In McGregor v. Johnson (C. C. A.) 39 F. (2d) 574, we allowed taxes on land accruing after the appointment of the receivers as a part of such administration expenses, but we did not pass on whether franchise taxes accruing during the receivership should be so treated. This question was not raised by the assignments of error which only claim priority of the taxes as a whole by virtue of the state's sovereignty. We accordingly shall not review the decision of the trial court as to this matter. See Spokane County, Wash., v. United States, 279 U. S. at page 85, 49 S. Ct. 321, 73 L. Ed. 621.

The order is affirmed.

[fol. 44] In United States Circuit Court of Appeals, Second Circuit

North River Coal & Wharf Company, Plaintiff,

vs.

McWilliams, Bros., Inc., Defendant; People of the State of New York, Appellant

Decree—Filed June 20, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 45] [File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,071. U. S. Circuit Court of Appeals, Second Circuit. Term No. 374. The People of the State of New York, petitioners, vs. Mark M. Maclay and Charles E. McWilliams, receivers of McWilliams Bros., Inc., and United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 17, 1932. File No. 37,071.

FILE COPY

FILED
NOV 17 19
CHARLES ELMORE

Supreme Court of the United States

October Term, 1932.
No. 374.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners-Appellants,
against
MARK M. MACLAY and CHARLES E. McWILLIAMS,
Receivers of McWILLIAMS BROS., INC., and
UNITED STATES OF AMERICA,
Respondents-Appellees.

MOTION TO ADVANCE

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Capitol, Albany, N. Y.

CHARLES A. SCHNEIDER,
ROBERT P. BEYER,
Deputy Assistants Attorney General,
Of Counsel for Petitioners-Appellants,
80 Centre Street,
New York City, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

October Term, A. D. 1932.
No. 374.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners-Appellants,
against
MARK M. MACLAY and CHARLES E. McWILLIAMS,
Receivers of McWILLIAMS BROS., INC., and
UNITED STATES OF AMERICA,
Respondents-Appellees.

Notice.

To

KOBBE, THATCHER, FREDERICK & HOAR,
Counsel for Appellees-Receivers,
128 Broadway, New York City, N. Y.

To

HON. THOMAS D. THATCHER,
Solicitor General of the United States
Attorney for Appellee, United States of America,
Washington, D. C.

SIRS:

PLEASE TAKE NOTICE that on the 19th day of December, 1932, or as soon thereafter as counsel can be heard, the within motion to advance will be submitted to the Supreme Court of the United States in the City of Washington, District of Columbia.

Printed copy of the motion is served upon you herewith.

CHARLES A. SCHNEIDER,
ROBERT P. BEYER,
Counsel for Appellants,
80 Center Street,
Borough of Manhattan,
City of New York, N. Y.

Service accepted this 18th day of November, 1932.

KOBBE, THATCHER, FREDERICK & HOAR,
Counsel for Appellees-Receivers.

THOMAS D. THATCHER,
Solicitor General of the United States,
Counsel for Appellee, United States of America.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932.
No. 374.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners-Appellants,
against
MARK M. MACLAY and CHARLES E. McWILLIAMS,
Receivers of McWILLIAMS BROS., INC., and
UNITED STATES OF AMERICA,
Respondents-Appellees.

Now comes The People of the State of New York, petitioners-appellants, and move this Honorable Court that

this cause be advanced for early hearing and placed upon the summary docket of this Court, and in support of this motion, makes the following brief statement of the matter involved and the reasons relied upon for the advancement:

1. That this matter comes before this Court upon the allowance of an application by the People of the State of New York for a writ of certiorari to review the determination of the United States Circuit Court of Appeals for the Second Circuit holding that where assets in the hands of a receiver are insufficient to pay tax claims due both to the Federal and a State Government in full, the claims of the Federal Government must be paid in full before any payment to the State.

2. In granting the petition for certiorari, this Court has consented to pass upon and determine the following questions:

(a) Has Congress the constitutional right to pass any law prejudicing or interfering with the sovereign right of priority possessed by a state.

(b) Can any statutory right of preference possessed by the Federal Government be equal to or superior to the sovereign right of preference possessed by a state.

(c) Determining the relative status of Federal and State Government in the payment of tax claims from an insolvent estate.

3. That the early determination of the questions involved in this case is of paramount public importance in the administration of the tax system of not only the Federal Government but those of the various states, and to final-

ly settle a conflict which for many years has existed between the United States Government and the several states.

4. A more detailed statement of the case is contained in the petition of petitioners-appellants on file in this cause and on which this Court has issued a writ of certiorari.

5. That this is not a case which will require any extended argument, as the facts are conceded and simple in nature, and the argument will be confined to the law to be applied in the correct determination of this case.

6. If this Honorable Court will place this cause upon the summary docket for hearing, the petitioners submit with confidence that this Court will reverse the Circuit Court of Appeals for the Second Circuit, and reaffirm and uphold the states in their reserved sovereign prerogative right inherited from the British Crown.

WHEREFORE, People of the State of New York, petitioners-appellants, pray that the cause be advanced on the calendar and assigned for hearing at an early date.

Respectfully submitted,

PEOPLE OF THE STATE OF NEW YORK,
Petitioners-Appellants.

CHARLES Q. SCHNEIDER,
ROBERT P. BEYER,
Counsel for Petitioners.

FILE COPY

SEP 17 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1932.

No. 374

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

against

MARK M. MACLAY and CHARLES E. MCWILLIAMS, Receivers of MCWILLIAMS BROS., INC., and UNITED STATES OF AMERICA,

Respondents.

MOTION FOR CERTIORARI, PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York.

CHARLES A. SCHNEIDER,
ROBERT P. BEYER,
Of Counsel for Petitioners,
80 Centre Street,
New York City, N. Y.

CASE PRESS, INC., 535 Pearl St., N. Y. Tel. Barclay 7-2670

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Supreme Court of the United States

OCTOBER TERM 1932.

No. .

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

MARK M. MACLAY and CHARLES E. MCWILLIAMS, Receivers of MCWILLIAMS BROS., INC., and UNITED STATES OF AMERICA,
Respondents.

MOTION FOR CERTIORARI.

Comes now the petitioners, The People of the State of New York, with Charles A. Schneider and Robert P. Beyer, as counsel, and moves this Honorable Court that it will by certiorari or other proper process directed to the Honorable Circuit Court of Appeals for the Second Circuit, requiring said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, entitled "North River Coal & Wharf Co., Complainant, against McWilliams Bros., Inc., Defendant; The People of the State of New York, Claimants-Appellants, against Mark M. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros., Inc., and United States of America, Appellees," and to that end your petitioners now tender herewith their petition and brief, with a certified copy of the record in said Circuit Court of Appeals.

CHARLES A. SCHNEIDER and
ROBERT P. BEYER,
Attorneys for Petitioners,
Office & Post Office Address,
80 Centre Street,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1932.

No. .

THE PEOPLE OF THE STATE OF NEW YORK,
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against
MARK M. MACLAY and CHARLES E. McWILLIAMS, Receivers of McWILLIAMS BROS., INC., and UNITED STATES OF AMERICA,
Respondents.

PETITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, The People of the State of New York, respectfully show to this Honorable Court:

FIRST: That there is pending in the District Court of the United States for the Southern District of New York a certain action in equity, entitled "North River Coal & Wharf Company, Complainant, against McWilliams Bros., Inc., Defendant." In connection with said action Mark M. Maclay and Charles E. McWilliams have been duly appointed by said United States District Court for the Southern District of New York as receivers of the defendant corporation, McWilliams Bros., Inc., for the purpose of liquidating its affairs and distributing its assets in the payment of the creditors of said corporation.

SECOND: That in connection with said case, the said District Court of the United States for the Southern District

of New York made an order on the 16th day of March, 1931 (Record on Appeal, fols. 97 to 105), which said order allows certain claims due by the defendant corporation to the United States of America, amounting in total to $34,180.43, with addition of interest as in said order provided, and further allowed the claim due to the State of New York for franchise taxes assessed against the defendant corporation in the principal sum of $3,131.05, with addition of interest as in said order provided.

THIRD: That the assets in the hands of the receiver for administration are insufficient to pay the several claims allowed to the United States of America and to the State of New York in full, and said order provided that the claim of the United States of America be paid, as far as the assets of the defendant corporation will permit, in full, before any payment be made by the receivers on account of the franchise tax claim of the State of New York.

FOURTH: From the said order of the District Court of the United States for the Southern District of New York an appeal was taken by the petitioners, The People of the State of New York, to the Circuit Court of the United States for the Second Circuit on three Assignments of Error, briefly summarized as follows: (1) That the claim of the petitioners, The People of the State of New York, for franchise taxes were payable in priority to the claims of the United States of America, said priority of the petitioners, The People of the State of New York, arising from the inheritance by the State of New York of the common law sovereign right of priority possessed by the Crown of England, a right which was not surrendered or ceded to the United States of America under and pursuant to the Constitution of the United States of America or any amendment thereof, and that the Congress of the United States of America had no constitutional right to pass any law or laws which would in any manner, shape or form prejudice or interfere with the assertion of the sovereign right of prior-

ity possessed by the petitioners, The People of the State of New York, in the payment of taxes and other indebtedness due said State.

FIFTH: That the United States of America did not inherit or obtain the sovereign right of priority possessed by the Crown of England, but that said priority was and is the exclusive right of the several States of the United States of America.

SIXTH: That should the Court determine that the United States of America had priority in the payment of its debts over general creditors, and that the United States of America had an equal priority with that possessed by the petitioners, The People of the State of New York, then said priorities are of the same class of preference, and that if the estate of the corporation in liquidation, to-wit, McWilliams Bros., Inc., is not sufficient to pay the several claims of the United States of America and The People of the State of New York in full, that the balance of the estate should be prorated between the United States of America and The People of the State of New York in the proportion that the balance of the estate in the hands of the receivers bears to the total amount of the respective claims of the United States of America and The People of the State of New York.

SEVENTH: The Circuit Court of Appeals of the United States for the Second Circuit affirmed the order of the District Court of the United States on the authority of *Spokane County* v. *The United States,* 279 U. S. 30, and the question for review before this Court is solely whether tax claims of the United States of America are entitled to a priority of payment over like claims possessed by individual States.

EIGHTH: The petitioners contend that the determination of the question involved is not precluded by the decision of this Court rendered in *Spokane County* v. *The United States,* 279 U. S. 30, but the facts in this case call for a different determination.

NINTH: That the proper determination of the question presented is of paramount public importance to finally settle a conflict which for many years has existed between the United States Government and the several States in the collection of taxes from estates of corporations and individuals in liquidation.

TENTH: That for many years prior to the determination made in the instant case, a verbal agreement existed between the United States Government and the State of New York to prorate their respective claims in estates where the assets were not sufficient to pay the several tax claims in full, and that by this agreement the determination of the question of the relative status of the Federal Government and the several States in such instances has been avoided. In the instant case, however, the position taken by the United States Government in insisting upon its priority of payment has finally resulted in a decision thus far adverse to the contention of the State of New York. Inasmuch as the final determination of the question involved has not been concluded by the decision of this Court in the Spokane case cited, and inasmuch as this same question will have to be finally settled in order to determine the relative status between the States and the Federal Government in insolvency liquidations, it is respectfully submitted that this is one of the cases where this Court should exercise its discretion in reviewing the determination made by the United States Circuit Court of Appeals for the Second Circuit through the allowance of the writ of certiorari applied for.

ELEVENTH: A final determination by this Court is not only of paramount public importance in the proper administration of the tax system of the State of New York, but is of equal importance in determining this question as affecting every State in the Union in its relation to the Federal Government.

TWELFTH: It is submitted by the petitioners, The People of the State of New York, that the priority of a sovereign State, as contended for herein, should be affirmed and reasserted by this Court so that the sovereignty of the State of New York, as interpreted by this Court in *Marshal* v. *The State of New York,* 254 U. S. 380, may be maintained and preserved.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the said cause therein, entitled "North River Coal & Wharf Company, Complainant, against McWilliams Bros., Inc., Defendant; The People of the State of New York, Claimants-Appellants, against Mark M. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros., Inc., and United States of America, Appellees," to the end that said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An Act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891 (26 Stat. 826, Chap. 517), and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the decree of the United States Circuit Court of Appeals for the Second Circuit in said cause and of the District Court of the United States for the Southern District of New York, and each and every part thereof may be reversed by this Honorable Court, and that the receivers herein be instructed and ordered to pay the claim of the petitioners, The People of the State of New York, with accumulated interest prior to the making of any payment on account of any claims filed

by the respondent, United States of America, and that this Honorable Court may make such further order and direction in the premises as may be in accordance with the law to be applied in the facts in this case.

And your petitioners will ever pray.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,
By JOHN J. BENNETT, JR.,
Attorney General of the
State of New York.

CHARLES A. SCHNEIDER,
ROBERT P. BEYER,
Counsel for Petitioners,
80 Centre Street,
New York City, N. Y.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

CHARLES A. SCHNEIDER, being duly sworn, deposes and says: That he is a Deputy Assistant Attorney General of the State of New York and is one of the counsel for the petitioners herein; that he has prepared the foregoing petition and that the allegations therein are true, as he verily believes.

CHARLES A. SCHNEIDER.

Sworn and subscribed before me this
15th day of September, 1932.

HENRY UNTERWEISER,
Notary Public, Bronx County.
Bronx Co. Clk.'s No. 1, Reg. No. ——.
N. Y. Co. Clk.'s No. 8, Reg. No. 4U7.
Kings Co. Clk.'s No. 7, Reg. No. 4002.
Queens Co. Clk.'s No. 602, Reg. No. 2827.
Commission expires March 30, 1934.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1932.

No. .

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,
against
MARK M. MACLAY and CHARLES E. McWILLIAMS, Receivers of McWILLIAMS BROS., INC., and UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioners, The People of the State of New York, petition this Honorable Court to review by certiorari an order of the Circuit Court of Appeals for the Second Circuit made final under Section 7 of an Act of Congress entitled, "An Act to Establish a Circuit Court of Appeals, and to review and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891 (26 Stat. 826, Chap. 517).

This case involves the decision on the sole question whether tax claims of the United States of America are entitled to payment in priority over like claims of individual States in insolvency liquidations where the assets are insufficient to pay all such claims in full.

The claim of the petitioners, The People of the State of New York, total $3,131.05, plus accrued interest, being for franchise and other taxes. The Federal Government's

claims total $34,180.43, plus accrued interest, being for income taxes and disbursements. There are insufficient funds to pay both claimants in full.

The People of the State of New York respectfully submit that if priority as between two sovereigns, independent and yet mutually associated, is to be determined, the claim of superior priority asserted by the United States of America should be denied and that of The People of the State of New York be recognized.

POINT I.

The People of the State of New York are entitled to a preference in the payment of indebtedness due it from an insolvent estate by reason of a sovereign prerogative inherited from the British Crown.

By virtue of the provision in the constitution of the State of New York that the common law of England should be and continue the law of the State, the latter, as sovereign, succeeded to the Crown's prerogative right of priority extending to all debts due to the State. This sovereign right has been fully recognized and given effect not only by the State's courts (*Re Carnegie Trust Co.*, 151 N. Y. App. Div. 606, affd. 206 N. Y. 390; *Matter of Neiderstein*, 154 N. Y. App. Div. 238; *Matter of Wesley*, 156 N. Y. App. Div. 403), but also by the United States Supreme Court (*Marshal* v. *State of New York*, 254 U. S. 380). Mr. Justice BRANDEIS, delivering the opinion for a unanimous court in the *Marshal* case, supra, stated, page 383:

> "This priority has been enforced by the courts of New York under a great variety of circumstances in an unbroken series of cases extending over more than half a century. It has been enforced as a right, and not as a rule of administration. This priority arose and existed independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every conten-

> tion made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority. The only changes of the right made by statute have been by way of enlarging its scope in certain cases."

POINT II.

The prerogative right of the State to a preferential payment has not been ceded to the Federal Government under any constitutional provision, but is still possessed by the State in full effect and vigor.

In *Lane* v. *Oregon,* 74 U. S. 71, this Court determined that each State possessed the right of taxation for its own economic purposes and that said right remained unimpaired by the cession of other powers to the Federal Government.

POINT III.

Congress has no constitutional right to pass any law prejudicing or interfering with the sovereign right of priority possessed by the State.

In *M'Culloch* v. *Maryland,* 4 Wheat. 316, 425, this Court commented on the right of taxation reserved to the States. In this connection, the language of the Court in *Whittaker* v. *Haley,* 2 Ore. 128, was decisive as showing the reason for the point, stating:

> "The revenue is the life of the State and for Congress to say when and where and in what manner it must be laid and collected, in other words, to say when a State should breathe, would be giving Congress the sole power of life and death over a State. What are the other rights worth when that upon which its life depends is denied? Interference as to any one of the incidents of levying and collecting taxes would as effectively take away State independence as it would to wholly deny the right."

POINT IV.

A statutory right of preference possessed by the Federal Government cannot be equal to or superior to a sovereign prerogative enjoyed by a State.

In *Marshal* v. *State of New York,* 254 U. S. 380, this Court, in an elaborate opinion, held that the State of New York derived its right of preference in the payment of obligations due it not only from statutes expressing such right, but as an inheritance from the Crown of England, an inheritance which should not extend to the Federal Government. The lesser nature of the Federal right of preference was expressed by this Court in *United States* v. *The State Bank of North Carolina,* 6 Pet. 29, 35, in which this Court determined that the claims due to the United States did not stand upon any sovereign prerogative, but were exclusively founded upon the actual provisions of Federal statutes. This lesser right of the Federal Government was again reiterated in *Field* v. *The United States,* 9 Pet. 182, and as recently as the decision rendered by this Court in *United States* v. *The State of Oklahoma,* 261 U. S. 253, in which the superior right of priority of the State of Oklahoma was allowed in preference to claims filed by the Federal Government.

In this connection, these decisions of this Court have been followed by Circuit Court decisions in other Circuits. May we refer to *Equitable Trust Co.* v. *Connecticut Brass Co.,* 290 Fed. 712, and *Liberty Mutual Co.* v. *Johnson,* 6 Fed. (2d) 752.

It will also be noted by this Court that Section 3466 of the Revised Statutes, on which the Federal Government relies in this case, has no lien features attached to it giving the Government any rights in and to the estate of the insolvent, except a statutory right of priority akin to that

inherited by the States from the common law. Hence, in harmonizing the authorities on the question, this Court must determine this case in accordance with the well-established principle that, as between the common law sovereignty of the State and the statutory preference of the Federal Government, the former should prevail.

POINT V.

Assuming, but not conceding, that the right of preference claimed by the Federal Government is equal in degree to that of a sovereign State, then both such rights to preference are equal to each other, and the assets of the insolvent should be prorated among both preferred claimants.

If superior sovereign status be denied to the United States of America, and similarly denied to The People of the State of New York, as against each other, then there must exist an equality of sovereignty between the two.

In *Re Wiley,* 292 Fed. 900, we find the Court construing the Bankruptcy Law and declaring it to be the rule that where State and Federal claims for taxes remain unpaid, prorating should be practiced. The following language of the Court is especially applicable to the instant case:

> "There is no competition here between any but tax liens. Considering the dual nature of our Government, and that neither the Union nor the States may destroy or hinder the other in their several functions, and all having equal need of their revenues, it is concluded that the intent of Congress was that there should be a pro rata payment upon all taxes named in Section 64-a, when the available fund is not sufficient to pay in full, the taxes due the United States having no priority over the others."

May we also refer to the language in *Re A. E. Fountain*, 295 Fed. 873, as follows:

> "It is evident that such a practical adjustment is much wiser than a contest between the two sovereignties in the imposition of statutory liens."

The record in this case shows that the lien of the State of New York for its demand accrued prior to the time of accrual of the Federal claims. According to the record in this case, the following is a detailed statement of the respective tax claims, the amounts and the dates of liens:

Gross Earnings Taxes (Sec. 184, Art. 9 of the Tax Law)

Taxable Year Ending	*Tax*	*Date of Lien*
June 30, 1921	$ 39.93	Aug. 1, 1921
June 30, 1922	653.27	Aug. 1, 1922
June 30, 1923	914.77	Aug. 1, 1923
June 30, 1924	208.85	Aug. 15, 1924
June 30, 1925	285.38	Aug. 15, 1925
June 30, 1926	193.64	Aug. 15, 1926
June 30, 1927	103.96	Aug. 15, 1927
June 30, 1928	24.93	Aug. 15, 1928

Franchise Taxes (Sec. 182, Art. 9 of the Tax Law)

Taxable Year Beginning	*Tax*	*Date of Lien*
Jan. 1, 1925	$215.62	Mar. 15, 1925
Jan. 1, 1926	208.22	Mar. 15, 1926
Jan. 1, 1927	173.11	Mar. 15, 1927
Jan. 1, 1928	99.37	Mar. 15, 1928
Jan. 1, 1929	10.00	Mar. 15, 1929

The Federal claims are as follows:

On account of Light House Service incurred by the defendant July 13, 1926, claim filed with receivers March 19, 1927.....$516.46

Additional Income Taxes

Taxable Period	*Amount*	*Date Assessed*	*Claim Filed*
Jan. 1, 1917–July 13, 1927	$ 5,263.24	Mar. 8, 1923	Jan. 25, 1927
Year 1918	$28,400.73	Sept. 15, 1925	Jan. 25, 1927

The claim of the United States Government on account of lighthouse service amounting to $516.46 was a general contract claim due to the Government and, in the absence of any judgment on said claim, would never ripen into a lien against insolvent's assets.

The other two Government claims aggregating $33,666.97 were claims for additional income tax for the tax years 1917 and 1918, apparently resulting from a re-audit of the reports filed by the insolvent corporation for the said tax years. The claims for these additional re-audited income taxes were filed with the receiver on or about January 20, 1927, and the statement of the claim asked interest from April 13, 1923, and November 13, 1925, which is the only statement in the record as to dates when re-audits were made (Record, fol. 42).

The tax claims of the State of New York for the years 1921 and 1922 were therefore prior both in point of time and lien to the claims of the United States Government. The State's claims for the years 1923, 1924 and 1925 were prior both in point of time and lien to the claims of the United States Government for $28,400.73, as to which the re-audit date cannot be taken earlier than November 13, 1925. The subsequent tax claims of the State of New York were prior, in date of accrual of lien on the corporate assets, to the claims of the United States Government as the Government acquired no lien on account of such additional income taxes claimed until the date of filing of a government lien under the statute. No government lien in this case appears to have been filed, the Government contenting itself with the filing of proofs of claim with the receiver on January 20, 1927. No lien of the Federal Government, therefore, ever attached to the corporate assets

and such lien cannot now be imposed to destroy in whole or in part the specific liens which the State acquired as of the dates hereinbefore set forth in the itemized schedule of its demands.

POINT VI.

The decision in *Spokane County* v. *United States*, 279 U. S. 30, is not controlling.

A careful review of the authorities cited in the opinion of the United States Supreme Court will demonstrate that the decision in that case is to be strictly confined to the facts then before the Court for adjudication. The case of *Field* v. *United States*, 9 Pet. 182, is cited, but is inapplicable, for in the instant case no attempt is made by the State of New York to favor individual creditors ahead of that of the United States. Nor is *U. S.* v. *Snyder*, 149 U. S. 210, which is cited, applicable, since the sole question raised in that case related to the State statute respecting the recording of liens by individual creditors and their effect on the Federal tax system.

The learned Chief Justice dismisses with much ado the decision of the Court in *Ferris* v. *Chic-Mint*, 14 Del. Ch. 232. In that case there were several claimants, including a mortgagee, the State of Delaware and the United States. Under the Revised Statutes, Section 3186, U. S. C., Title 26, Section 115, the mortgagee was given priority over the United States. The Delaware Law granted a preference to the State over the mortgagee. The Chancellor allowed the claims in the following order: The State, the mortgagee and the United States. The distinguished Chancellor very properly concluded:

> "When the government agreed, by § 3186, to take grant after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior."

This decision, as was stated, was dismissed by the Chief Justice with the statement:

> "Since no third creditor was involved, the case is not in point."

With due respect for the opinion of the Court, we, nevertheless, regard the decision as clearly applicable, since the Government failed to contest the claim of priority accorded to the State as such, apart from the preference gained by the State by reason of its superior status over the mortgagee.

Despite the inapplicability of the cases cited, and to which we have just alluded, the learned Chief Justice concluded:

> "The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority forthwith over those of the states."

Frankly, we do not understand that the cases cited by the learned Chief Justice do, in fact, support the Federal Government's contention, that thereby the right to priority was "established" or sustained on behalf of the United States as against the States. We make this statement with all due deference for the Court's opinion.

Apart from these considerations, we cannot regard the *Spokane* case as representing a true test of the important question involved. A fair construction inevitably must lead one to the conclusion that, apart from all other considerations, it was decided upon the technical ground that there had been a failure on the part of the parties involved in the *method of perfecting* their liens, and having failed to properly perfect their liens, the claim of the Federal Government enjoyed priority. In the instant case, there is no like question. The Federal Government does not assert that the State's liens had not attached, nor that they had been improperly perfected, since the statute very plainly indicates the automatic character of the lien.

A case not cited, but which we nevertheless boldly present, appears to sustain the Federal Government's contention. We present it herewith with the sole comment that we do not believe it to represent authoritative law.

Exchange National Bank v. *U. S.*, 147 Wash. 176.

The doctrine enunciated is dangerous since it places the burden of proof upon the State to establish its supremacy over that of the Federal Government, and the Court concludes that no authority is presented giving supremacy to the State where conflict arises between it and the Federal Government as to priorities. We quote from the Court's opinion:

> "When the State granted to the Federal government the power to levy taxes, it thereby gave up the right to maintain that its taxes should be superior to those of the Federal government, if Congress by appropriate legislature declared their supremacy.
>
> We now turn to the contention that since the State is not named in * * * 3466 (that section) will not be construed as binding upon the State. The argument is twofold: First it is said that a familiar rule of construction requires us to hold that, whenever a sovereign is not named in a Statute, it is not bound by the Act if it tends to restrain or diminish its rights or powers * * *" (citing two cases).

The second contention is not pertinent, hence not referred to. Despite this "familiar rule of construction," referred to as the first argument, the Court, nevertheless, held that the sovereign, though not named in the statute, was bound by Section 3466, thus defying all precedent to the contrary. The dissenting opinion, after reciting that the claim of the State is excluded from the operation of Section 3466, urged:

> "The States existed before the United States. They created the Union, and by express constitutional provision, that Union has only such powers

> as are expressly delegated to it or are necessary to carry into effect the delegated powers. All other governmental powers are expressly reserved to the States. * * * If Congress can enact the law making its tax a first claim against the property of an insolvent corporation, then it has power to make its tax a first claim against all property of solvent persons and corporations and thereby take from the State its power to exist."

Our case can hardly be presented in better language. The dissenting opinion re-echoes the famous doctrine enunciated by the great Chief Justice of the United States Supreme Court, JOHN MARSHALL, that "the power to tax is the power to destroy," and if the Federal Government is unrestrained in its present effort, it must inevitably lead, if not to the destruction of the States, surely to its circumscription.

The question at issue may be stated as follows: Shall we allow the theory to prevail that all power is to be centralized in the Federal Government, or shall we preserve the principles upon which the Federal Government was founded, namely, the establishment by a compact of an association of states for the protection of all as against a common enemy or as against each other?

The distinguishing features of the *Spokane* case with that of the case at bar appear from the limitations of the *Spokane* case, in the following quotation from page 94 of the opinion:

> "It seems clear to me that each of these two tax debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the state, and the record in this case showing the manner of the levying of these respective taxes, will render this plain. The revenue legislation of each has prescribed procedure by which

> its personam tax debts may be made specific liens upon property of one personally owing such tax debts. This record, I think, warrants the conclusion that neither the United States, the state of Washington, nor Spokane county for the state of Washington, has ever, by the prescribing statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds. I, therefore, view these respective tax debts wholly apart from any supporting lien right."

In other words, before the State of Washington or the County of Spokane acquired any specific lien against the property of any insolvent corporation, it was necessary to take some assertive form of procedure. Under the Tax Law of the State of New York (Sec. 197), it is unnecessary for the State to take any such procedure before acquiring a lien, as the statute makes its demands liens from the time that the tax is imposed until the same is paid in full. The lien, therefore, is automatically created, without the necessity of any affirmative procedure following the imposition of the tax. The Court in this case is, therefore, concerned with the following situation: The United States goes into court with tax demands which have not ripened into any specific lien, claiming a mere right of priority under Section 3466 of the Revised Statutes, which creates a mere preferential right of payment as against individual creditors. The State goes into court with tax claims, all of which have ripened into statutory liens, and all of which have become specific liens upon the property of the insolvent corporation in point of time prior to the accrual of any Federal lien.

Mr. Chief Justice TAFT in the *Spokane* case clearly indicated that in a situation as now presented to the Court for adjudication, the fact that the sovereign claim ripened into a statutory lien would give such claim a priority of payment to the claim of another sovereignty not thus protected and secured.

The Court's opinion in *U. S.* v. *Nicholls,* 4 Yeates 251, bears repetition here:

> "The rights of a general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This can only be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be granted as prayed for.

From the foregoing brief, this Court will appreciate the national and state importance of the question involved and the necessity for a final and conclusive determination by this Court.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Capitol, Albany, New York.

By

CHARLES A. SCHNEIDER,
ROBERT P. BEYER,
Deputy Assistants Attorney General,
Of Counsel for Petitioners,
80 Centre Street,
New York City, N. Y.

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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE PEOPLE OF THE STATE OF NEW YORK,
PETITIONERS

v.

MARK M. MACLAY AND CHARLES E. MCWILLIAMS, RECEIVERS OF MCWILLIAMS BROS., INC., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 374

THE PEOPLE OF THE STATE OF NEW YORK, petitioners

v.

MARK M. MACLAY AND CHARLES E. MCWILLIAMS, Receivers of McWilliams Bros., Inc., and United States of America

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 32) is not reported. The opinion of the Circuit Court of Appeals (R. 40–45) is reported in 59 F. (2d) 979.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 46.) The petition for certiorari was filed September 17th, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of Section 3466 of the Revised Statutes, a claim for taxes due to the State of New York against an insolvent debtor, takes precedence over the claim of the United States against the debtor for income taxes, when the New York statute provides that the taxes due to New York shall constitute a lien upon the property of the taxpayer.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra,* pp. 7–8).

STATEMENT

The receivers of the insolvent, McWilliams Bros., Inc., requested the District Court for the Southern District of New York to determine the amounts and validity of certain claims of the United States and the State of New York against the insolvent and the respective priorities, if any, of these claims. (R. 12, 14, 17–18.) The parties stipulated the facts applicable to these claims as follows (R. 19, 23):

The receivers were appointed January 10, 1927, pursuant to a court order. (R. 19.) The receivership was made permanent a few days later. (R. 20.) The United States on January 25, 1927, filed claims for replacing a buoy, run into by the debtor and lost (amounting to $516.46 with interest), also for income taxes for a portion of 1917, assessed against the insolvent's predecessor (amounting to

$5,263.24 with interest), and for 1918, assessed against the insolvent (amounting to $28,400.73 with interest). (R. 20–22.) The claim of the State of New York for $3,131.05 with interest, agreed by the United States to be valid as stated (R. 22), was based upon franchise and gross earnings taxes, some of which were due previous to and some of which were due after the appointment of the receivers (R. 15–16).

The District Court set the claims down for hearing on the question of priority (R. 30) and thereafter entered an order awarding priority to the claims of the United States (R. 32). The Circuit Court of Appeals affirmed this order. (R. 46.)

DISCUSSION

Neither the petition nor brief in support contains a statement of reasons for granting the writ or a specification of errors to be relied upon, as required by the rules of this Court.

The State of New York is seeking a review by this Court of a controversy between itself and the United States. In all cases where one of the States of the Union seeks to have litigation between itself and the United States reviewed by this Court we believe that the mere existence of such a controversy presents a question worthy of review in this Court, irrespective of the merits of the State's contentions. For this reason we do not oppose the issuance of a writ in this case, although we believe that the action of both courts below was correct and

in conformity with the decisions of this Court. For the guidance of the Court we are stating briefly our contentions, which are based primarily upon the grounds set forth in the opinion of the court below.

The instant case involves the priority of claims of the United States for unpaid income taxes as opposed to claims by the State of New York for taxes against an insolvent debtor whose assets are not sufficient to pay the claims of both. The claims of New York are based upon unpaid franchise and gross earnings taxes due to it, which the court below held had become general liens against the insolvent's property under Sections 197 and 201 of the New York Tax Law (*infra*, p. 7), as construed by the courts of that State. *New York Terminal Co.* v. *Gavs*, 204 N. Y. 512; *Carey* v. *Keith, Inc.*, 250 N. Y. 216. The contention of the United States is founded upon Section 3466 of the Revised Statutes (*infra*, p. 7), which gives it priority of payment for debts due from an insolvent. Any priority arising in favor of the United States attached at the time the receivers were appointed. *United States* v. *Oklahoma*, 261 U. S. 253, 260.

A similar question was involved in *Spokane County* v. *United States*, 279 U. S. 80, but that case differed from the instant one in that this Court concluded there that none of the parties interested had perfected a lien against the property of the insolvent at the time the receiver was appointed. The contested claims were based on income taxes

due the United States and taxes assessed by two counties of the State of Washington, acting as its agencies. This Court, after considering the view of the State court from which the case came that the State law required affirmative action in order to procure a specific lien on the debtor's property, held that under the circumstances Section 3466 gave the United States priority, but it reserved the question as to what would have been the result had the liens of the State agencies been perfected before the appointment of the receiver.

The court below construed the applicable decisions of this Court to hold that the United States has priority in all cases except where the legal title of the taxpayer had been in some measure divested before the tax or other indebtedness became due. In *Thelusson* v. *Smith,* 2 Wheat. 396, debts due the United States were given precedence over a lien of a judgment creditor who had not levied an execution against the property of the debtor. But a mortgagee's interest was held not to be subject to claims by the United States against the mortgagor. *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; *Brent* v. *Bank of Washington,* 10 Pet. 596; *Savings Society* v. *Multnomah County,* 169 U. S. 421, 428. The court below was of the opinion, in view of the decisions of this Court, that a mere statutory declaration by a State of a general lien (such as that given by the New York statutes involved here) does not override the broad language of Section 3466 so as to defeat the priority of the United States.

The State of New York contends that its lien arises in the exercise of a sovereign right, never ceded to the Federal Government. But we believe that Article I, Section 8, of the Constitution, providing that Congress shall have power to lay and collect taxes and to make all laws which shall be necessary and proper to carry this and its other powers into execution, as buttressed by Article VI, declaring that laws made in pursuance of the Constitution shall be the supreme law of the land, is sufficient authority to give Section 3466 the effect ascribed to it by the court below.

CONCLUSION

In view of the fact that in this case a State of the Union is claiming priority against the United States and since the decision below affects the taxing power of both sovereigns, we do not oppose the instant petition.

Respectfully submitted.

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G. A. YOUNGQUIST,
Assistant Attorney General.
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Special Assistants to the Attorney General.
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OCTOBER, 1932.

APPENDIX

Revised Statutes, Sec. 3466 (U. S. C., Title 31, Sec. 191):

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

New York Tax Law, Consol. Laws, c. 60, provides in part as follows:

> SEC. 197. * * * Each such tax or fee [including those imposed by Sections 182 and 184 of the New York Tax Law] shall be a lien and binding upon the real and personal property of the corporation * * * liable to pay the same until the same is paid in full. * * *
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> SEC. 201. *Warrant for the collection of taxes.*—After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the tax commission, if an appeal or other proceedings have been taken to re-

view the same, and the undertaking given as provided in this article, the tax commission may issue a warrant under its official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the persons, partnerships, company, association, or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the tax commission and pay to the tax commission the money collected by virtue thereof, by a time to be therein specified, and not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association, or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In case any warrant pursuant hereto is returned unsatisfied, or is not returned satisfied within thirty days after the date when such warrant is made returnable, the tax commission may proceed upon the warrant in all respects, with like effect, and may deputize any assistant, or other officer or other employee of the tax department to so execute the warrant, and shall be entitled to the same fees for services as the sheriff is entitled to charge.

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CHARLES ELMORE

No. 374

In the Supreme Court of the United States

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THE PEOPLE OF THE STATE OF NEW YORK
PETITIONERS

v.

MARK M. MACLAY AND CHARLES E. MCWILLIAMS, RECEIVERS OF MCWILLIAMS BROS., INC., AND UNITED STATES OF AMERICA

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The opinion of the District Court (R. 18) is not reported. The opinion of the Circuit Court of Appeals (R. 22–28) is reported in 59 F. (2d) 979.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 28.) The petition for certiorari was filed September 17, 1932, and was granted October 24, 1932. (R. 29.) Jurisdic-

tion is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 3466 of the Revised Statutes gives priority to the United States for tax and other claims against an insolvent debtor over claims of the State of New York for franchise and gross earnings taxes due from the debtor, in view of a declaration in the New York statutes to the effect that such taxes are to be liens against the property of the taxpayer.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra*, pp. 13–16).

STATEMENT

The receivers of the insolvent[1] McWilliams Bros., Inc., requested the District Court for the

[1] For convenience, throughout this brief, McWilliams Bros., Inc., is referred to as the "insolvent." Receivers were appointed upon the filing of a creditor's bill alleging that the corporation's assets exceeded its liabilities and praying for the appointment of a receiver, and an answer admitting the allegations of the bill and joining in the prayer for relief. (R. 23.) Under these circumstances the receivership amounted to a voluntary assignment (*Price* v. *United States*, 269 U. S. 492, 502), and the right of the United States to priority was therefore the same as if the corporation had been insolvent. (R. 23.) Furthermore, it is obvious that the corporation was in fact insolvent or it would have been unnecessary to have an order determining priorities.

Southern District of New York to determine the amounts and validity of certain claims of the United States and of the State of New York against the insolvent, and the respective priorities, if any, of these claims. (R. 6–9.) The attorneys for the United States and the State of New York stipulated the facts applicable to this determination, of which the following is a summary (R. 9–12):

Temporary receivers, appointed January 10, 1927, by court order, were made permanent January 29, 1927. (R. 10.) About March 24, 1927, the United States filed a claim for $516.46 with the receivers for expenses incurred in replacing one of its buoys which was run into by a tug of the insolvent and lost. Previously, on January 25, 1927, the United States had filed a claim for additional income tax against the insolvent for a period in 1917, in the amount of $5,263.24. This assessment was made March 8, 1923. The United States also filed a similar claim for income taxes for 1918 in the amount of $28,400.73. This assessment was made September 15, 1925. (R. 10–11.)

The State of New York, about September 16, 1927, entered a claim of $2,317.82 for franchise and gross earnings taxes due it for the years 1921 to 1925, inclusive, under Sections 182 and 184 of the Tax Law of that State. On January 12, 1928, the State of New York gave notice of a similar claim in regard to taxes against the insolvent for 1925, 1926, 1927, and subsequent years. On January 5,

1929, the State sent the receivers a liquidated claim for these taxes in the amount of $813.23, some of these taxes being for the period after the appointment of the receivers. (R. 7–8, 12.)

Both the United States and the State of New York agree that the claims of each party are valid in the amounts stated and that the only question is with respect to the right to priority of payment of these claims. (R. 12.)

The District Court held a hearing on the matter of priority of these claims (R. 12–18) and subsequently determined that the claims of the United States should be paid before those of the State of New York (R. 18–19). The Circuit Court of Appeals affirmed this order. (R. 28.)

SUMMARY OF ARGUMENT

This Court held in *Spokane County* v. *United States,* 279 U. S. 80, that the claims of the United States prevailed over those of a State by virtue of Section 3466 of the Revised Statutes, although the State statutes granted a general lien for taxes upon all the property of the taxpayers which, in the particular case, had not been perfected as a lien upon specific property. In the instant case, Section 201 of the New York Tax Law did provide a method whereby a specific lien could be created to cover unpaid taxes. This section has not been complied with. In view of the provisions of Section 201, Section 197 of that law, as construed by the courts, must be considered as creating only a gen-

eral lien, in the nature of an extension of the common law right of the sovereign to priority of payment of its debts, which when it conflicts with that of the United States, as in this case, must give precedence to the latter.

ARGUMENT

In the instant case the sole question is whether the provisions of the New York Tax Law create a lien, on account of taxes due the State of New York from an insolvent, which will take precedence over tax and other claims of the United States which otherwise would be given priority of payment by Section 3466 of the Revised Statutes (*infra*, p. 13) out of the insolvent's estate.

The question whether claims of the United States rather than those of a State should be paid first out of an insolvent's estate has been considered by this Court recently in *Spokane County* v. *United States*, 279 U. S. 80. In that case it was held that the lien given by a statute of the State of Washington, as construed by the State courts, was of such a general character that it did not supersede the priority of the United States if at the time this priority attached there had not been a distraint by the sheriff or any other procedure essential to make the lien specific.

The interpretation of the statute by the State court was that the general statutory declaration of a lien created merely an inchoate tax lien right against the property of the taxpayer which was not

perfected as a specific lien until the prescribed procedure was completed with reference to the particular property involved. In view of the decision in the *Spokane case,* the court below appears to have correctly narrowed the precise problem now involved when it stated (R. 26)—

> While it is clear that in the present case the taxes due the state of New York prior to the receivership were a general lien upon the real and personal property of the defendant at the time when the receivers were appointed, the question is not whether these taxes are statutory liens of some sort, but whether they are such liens as the courts of the United States have recognized as entitled to priority over claims due the government.

The priority of the United States, if any, attached, under Section 3466 of the Revised Statutes, when the receiver was appointed. *United States* v. *Oklahoma,* 261 U. S. 253, 260. This priority applied to taxes due as well as to other debts. *Price* v. *United States,* 269 U. S. 492, 499. It is settled by the decisions of this Court that a mortgage of real estate is a conveyance of such an interest as will defeat the priority given by the above section. *Savings Society* v. *Multnomah County,* 169 U. S., 421, 428; *Brent* v. *Bank of Washington,* 10 Pet. 596; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386. But it has been held that the United States will take priority over the lien of a judgment creditor who

has not levied an execution against the debtor's property. *Thelusson* v. *Smith,* 2 Wheat. 396. The authority of the United States, in exercising its taxing power, to secure priority in payment of its claims over those of the States, is clear, and Section 3466 is to be liberally construed to achieve this end. *Spokane County* v. *United States, supra,* at p. 93. Whenever the powers of the United States and those of a State conflict, the latter must yield, even though this interferes with the exercise of its full powers of taxation. *Florida* v. *Mellon,* 273 U. S. 12, 17.

When the receivers in the present suit were appointed, the United States had assessed the income taxes against the insolvent which are the basis of the Government's tax claims involved in the present suit, and the insolvent at that time was liable for damages to property of the United States. The insolvent also was indebted to the State of New York for franchise taxes for 1921 and subsequent years, which were imposed by Section 182 of the Tax Law of that State. Later, the claims for franchise taxes were extended to include those for the years up to and including 1929. The State also had claims for gross earnings taxes against the insolvent for the same period (excepting 1929) imposed under Section 184 of the Tax Law. Section 197 of the New York Tax Law (*infra,* p. 14) provided that the taxes imposed by Sections 182 and 184, among others, should be a lien upon the per-

sonal and real property of the taxpayer until the taxes were paid in full. Previously, this section had contained a provision to the effect that the lien for such a tax should apply "from the time when it is payable."

In *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512, it was held that this section, at the time that it contained this proviso, created a lien on property from the time the tax became payable, which took priority over the interest of a mortgagee. See also *Engelhardt* v. *Alvino Realty Co.,* 248 N. Y. 374. Section 197 and the *N. Y. Terminal Co. case* were considered by this Court in *Marshall* v. *New York,* 254 U. S. 380. It was there pointed out (pp. 382–384) that this section was an extension of the common law right inherent in the State of New York as a soverign, whereby it had priority over other creditors for the payment of its claims. At common law, it was said, this right did not prevail over a specific lien created by the debtor before the sovereign exercised its right to payment, but the New York legislature had extended this right so as to give certain taxes priority in payment over previous incumbrances. The omission of the phrase, "from the time when it is payable," from Section 197 as in effect when the taxes in question became due, has been held not to have changed the time when the liens for such taxes arose, and this is still the time when the taxes are payable. The lien attaches at that time, notwithstanding that the

amount of the tax has not been computed. *Carey* v. *Keith, Inc.*, 250 N. Y. 216.

The distinction between general and specific liens, which was the basis of the decision in the *Spokane case,* does not appear to have been considered by the New York courts in relation to the statutes of that State involved in the present case. However, it has been held that an agreement between private parties to the effect that one should have a "lien" on the property of the other created only a general lien and not a specific one. *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47, 52. It may, therefore, be argued that since Section 197 provides merely that a "lien" is created on the taxpayer's property, the decision in the *Rohrbach case* indicates that the statute, in employing the same word used in the agreement there considered, does not create a specific lien, but only a general lien.

Another strong indication that Section 197 did not create a specific lien, within the meaning of the *Spokane case,* is that Section 201 of the New York Tax Law (*infra,* p. 14) provides that if the amount stated in a tax account is not paid within thirty days from the sending of a notice of such an account, the tax commission may issue a warrant directed to the proper sheriff commanding him to levy upon and sell the real and personal property of the taxpayer for the payment of taxes. This section provides, among other things, that:

> Such warrant shall be a lien upon and shall bind the real and personal property * * *

> from the time an actual levy shall be made by virtue thereof.

The section also provides that the sheriff shall proceed in the same manner under such a warrant as is done in respect to executions issued against property upon judgments of courts of record. There is nothing in the record in the instant case to indicate that any action had been taken under this section. Its provisions indicate that the lien given by Section 197 is similar to that of the judgment creditor considered in *Thelusson* v. *Smith, supra,* which did not become specific until an execution had been levied against particular property. The preference given to the State over mortgagees of the debtor by Section 197, as this Court stated in *Marshall* v. *New York, supra,* must be taken to be no more than an extension of the common law priority of the sovereign in payment of its debts in preference to certain incumbrances.

From the above analysis of the New York statutes it is apparent that in the instant case the court below correctly held that the State of New York did not acquire such a definite interest in the insolvent's property by virtue of Section 197 as to distinguish the State's claim for priority in the payment of taxes from the claim of the State considered in the *Spokane decision, supra.* Accordingly we believe that the decision in that case controls this one.

The situation resolves itself into a conflict between the respective priorities of the United States

and those of the State of New York, in which case the claims of the United States must prevail. *Spokane County* v. *United States, supra.* What was said by this Court in *Lane County* v. *Oregon,* 7 Wall. 71, is particularly pertinent here. There the statement was made that (p. 77):

> * * * In respect, however, to property, business, and persons, within their (the United States and the States) respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, *the claim of the United States, as the Supreme authority, must be preferred;* but with this qualification it is absolute. * * * (Italics ours.)

See also the statement of this Court in *United States* v. *Snyder,* 149 U. S. 210, at page 214. In *United States* v. *Oklahoma, supra,* it was said at page 260 that "* * * The priority given the United States [by Section 3466 of the Revised Statutes] can not be impaired or superseded by state law. * * *" See also *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483; *United States* v. *Butterworth Corp.,* 269 U. S. 504; *Merryweather* v. *United States,* 12 F. (2d) 407 (C. C. A. 9th); *In re Essenkay Products Co.* 5 F. (2d) 668 (C. C. A. 7th); *Central Trust Co.* v. *Third Av. R. Co.,* 186 Fed. 291 (C. C. A. 2nd); *Stover* v. *Scotch Hills Coal Co.,* 4 F. (2d) 748 (W. D. Pa.); and *United States* v. *San Juan County,* 280 Fed. 120 (W. D. Wash.).

Contra, In re A. E. Fountain, Inc., 295 Fed. 873 (S. D. N. Y.).

CONCLUSION

The judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted.

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JANUARY, 1933.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (U. S. C., Title 31, Sec. 191.)

SEC. 3184. Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes, within ten days after the service or the sending by mail of such notice, it shall be the duty of the collector or his deputy to collect the said taxes with a penalty of five per centum additional upon the amount

of taxes, and interest at the rate of one per centum a month. (U. S. C., Title 26, Sec. 104.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 875:

SEC. 613. LIEN FOR TAXES.—(a) Section 3186 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *." (U. S. C. Sup., Title 26, Sec. 115.)

New York Tax Law, Consol. Laws, c. 61, provides in part as follows:

SEC. 197. * * * Each such tax or fee [including those imposed by Sections 182 and 184 of the New York Tax Law] shall be a lien and binding upon the real and personal property of the corporation * * * liable to pay the same until the same is paid in full. * * *

SEC. 201. *Warrant for the collection of taxes.*—After the expiration of thirty days from the sending by the commission of a

notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the tax commission, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the tax commission may issue a warrant under its official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the persons, partnerships, company, association, or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the tax commission and pay to the tax commission the money collected by virtue thereof, by a time to be therein specified, and not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association, or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In case any warrant pursuant hereto is returned unsatisfied, or is not returned satisfied within thirty days after the date when such warrant is made returnable, the tax commission may

proceed upon the warrant in all respects, with like effect, and may deputize any assistant, or other officer or other employee of the tax department to so execute the warrant, and shall be entitled to the same fees for services as the sheriff is entitled to charge.

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SUPREME COURT OF THE UNITED STATES.

No. 374.—October Term, 1932.

The People of the State of New York, Petitioners, *vs.* Mark M. Maclay and Charles E. McWilliams, Receivers of McWilliams Bros., Inc., and The United States of America, Respondents.	On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[February 6, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy is one between the United States and a state as to priority of payment out of the assets of an insolvent corporation.

Receivers of the corporation were appointed by a consent decree in January, 1927, and creditors were directed to file their claims. The decree had the effect of a general assignment. *Price* v. *United States*, 269 U. S. 492, 502. The United States filed with the receivers a claim for additional taxes in the sum of $33,663.97 due from the insolvent for the years 1917 and 1918, and also a claim for $516.46 expenses incurred in the replacement of a buoy run into by the insolvent's tug. The State of New York filed a claim for franchise taxes due for the years 1921 to 1925, but not assessed or liquidated till after the receivership. It filed another claim afterwards for taxes due for later years. The District Court held that under section 3466 of the Revised Statutes (31 U. S. Code, sec. 191), the debt owing to the United States had a preference over the debt owing to the state in the distribution of the fund. Upon appeal to the Circuit Court of Appeals for the second circuit, the decree was affirmed. 59 F. (2d) 979. The case is here on certiorari.

The decision of this court in *County of Spokane, Washington*, v. *United States*, 279 U. S. 80, upheld the power of Congress to give priority to debts due to the People of the United States, though

the debts thereby subordinated were due to the People of a State, or its political subdivisions. To that decision we adhere. The hardship to the state, if there is any, "is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends." Marshall, C. J., in *United States* v. *Fisher*, 2 Cranch. 358, 396. Cf. *Florida* v. *Mellon*, 273 U. S. 12, 17.

The tax held to have been subordinated in the Spokane County suit was not a perfected lien upon the property of the insolvent at the date of the receivership. 279 U. S. 80, 93, 94. The question was reserved whether a different conclusion would have been necessary if such a lien had been proved. 279 U. S. 95. Certiorari was granted in this case because of the claim of the petitioner that by the statutes of New York franchise taxes become liens in advance for the years in which they are due, though the amount is not fixed and must be liquidated thereafter.

Liens in a sense they unquestionably are, but, we think, not so perfected or specific as to change the rule of distribution. The receivers were appointed, as we have seen, in January, 1927; and the petitioner, if not preferred at the time of the appointment, did not win itself a preference by anything done thereafter. *United States* v. *Oklahoma*, 261 U. S. 253, 260. By the statutes of New York, "every such tax or fee [including the annual franchise tax to be paid by corporations] shall be a lien and binding upon the real and personal property of the corporation . . . liable to pay the same until the same is paid in full." N. Y. Tax Law, Consolidated Laws, c. 60, sec. 197. The lien thus created is effective for many purposes though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid. *Carey* v. *Keith, Inc.*, 250 N. Y. 216; *Engelhardt* v. *Alvino Realty Co., Inc.*, 248 N. Y. 374. In that respect it is similar to the lien of a transfer tax or duty upon the estate of a decedent. *Midurban Realty Co.* v. *F. Dee & L. Realty Corporation*, 247 N. Y. 307; *Stock* v. *Mann*, 255 N. Y. 100, 104. It will even be superior, at all events after assessment (*N. Y. Terminal Co.* v. *Gans*, 204 N. Y. 512, 514) to mortgages already made, and will thus prevail against a purchaser who buys at a foreclosure sale. *N. Y. Terminal Co.* v. *Gans, supra.* Cf. *Marshall*

v. *N. Y.*, 254 U. S. 380, 384. All this is settled in New York by reiterated judgments.

The problem here is different. To hold that a lien has progressed to such a point as to be a warning to mortgagees and purchasers of a contingent liability, like a notice of *lis pendens*, is far from holding that while the liability is unliquidated and unknown the lien thus created is perfect and specific. By the terms of the hypothesis it is nothing of the kind. If the state were to stand upon the warning and omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell. Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers became chargeable with notice. The doctrine of relation will not divest the United States of the preference that accrued when receivers were appointed.

In what has been written there has been an assumption in favor of the petitioner that the tax would have priority if its amount had been liquidated before rights and interests became static through insolvency proceedings. The assumption is hardly to be reconciled with a judgment of this court pronounced a century and more ago. *Thelusson* v. *Smith*, 2 Wheat. 396, 426. The ruling there was that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession. Later cases have drawn a distinction between the liens of judgments and of mortgages. These last have been thought to have the effect of a conveyance, divesting the debtor of his title and leaving nothing but an equity to which a preference can attach. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612; *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428. We do not now determine whether the holding in the mortgage cases is to be applied in jurisdiction[3] where a mortgage upon real estate is a lien and nothing more (*Trimm* v. *Marsh*, 54 N. Y. 599), nor whether, if so applied, it imports a modification of the holding in the *Thelusson* case as to the lien of a judgment. Cf. *United States* v. *Bank*, 3 Story 79, 81; *United States* v. *Duncan*, 4 McLean 607, 630. A mortgage, even though a lien, is one much more specific than a judgment or a tax, much

closer to ownership. *Conard* v. *Atlantic Insurance Co., supra,* p. 443; *In re Boyd,* 4 Sawyer 262, 264. Into these refinements and their consequences, there is no need to enter now. Enough for present purposes that the statutory preference must prevail against the lien of a tax not presently enforcible, but serving merely as a *caveat* of a more perfect lien to come.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.